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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL RICHARD FLEMING,

Defendant and Appellant.

2d Crim. No. B237026  
(Super. Ct. No. F453482)  
(San Luis Obispo County)

Michael Richard Fleming appeals a judgment entered following his nolo contendere plea to one count of passing checks with insufficient funds, with an admission that he suffered a prior felony strike conviction for attempted carjacking. (Pen. Code, §§ 476a, subd. (a), 664, 215, 667, subds. (b)-(i), 1170.12, subds. (a)-(d).)<sup>1</sup> We conclude that the trial court did not abuse its discretion by denying his motion to strike a prior serious felony conviction and affirm. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 504.)

*FACTS AND PROCEDURAL HISTORY*

On November 22, 2010, the San Luis Obispo County district attorney charged Fleming with three counts of passing checks with insufficient funds and one count of grand theft by false pretenses. (§§ 476a, subd. (a), 487, subd. (a).) The district

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<sup>1</sup> All further statutory references are to the Penal Code.

attorney also alleged that in 2005, Fleming suffered a serious felony strike conviction for attempted carjacking. (§§ 664, 215, 667, subds. (b)-(i), 1170.12, subds. (a)-(d).)

On February 9, 2011, Fleming waived his constitutional rights and pleaded *nolo contendere* to one count of passing checks with insufficient funds and admitted suffering the prior strike conviction. In accordance with a plea agreement, his maximum sentence would be a doubled low-term of 16 months (32 months). Prior to sentencing, Fleming filed a motion pursuant to *People v. Superior Court (Romero)*, *supra*, 13 Cal.4th 497, 504, requesting the trial court to exercise its discretion and strike the prior serious felony conviction. Among other things, Fleming asserted that he had been a dependent child who had used illegal drugs but he was now employed and had a family.

At the sentencing hearing, the district attorney opposed the *Romero* motion and pointed out that the attempted carjacking involved an elderly man who suffered a broken ankle after he was knocked to the ground and kicked by Fleming and his crime partners. The district attorney added that Fleming entered into a plea agreement regarding attempted carjacking and admitted inflicting great bodily injury upon the victim. In response to the trial judge's inquiry, Fleming stated that he served four and one half years imprisonment and was on parole at the time he committed the present offense. The trial court then denied the motion, stating that it could not "get past" the circumstances of the prior strike conviction, that Fleming had been released from prison only recently, and that he "hasn't led a blame-free life." The court also noted that a volunteer paid a portion of the restitution in the present case but has since regretted the payment.

Fleming appeals and contends that the trial court abused its discretion by denying his *Romero* motion.

#### *DISCUSSION*

Fleming argues that the 2005 attempted carjacking was his first felony offense and that he was only 19 years old when he committed that crime. He adds that he wrote the insufficient funds checks in order to provide for his wife and child. Fleming contends that the trial court improperly emphasized the factual circumstances of the prior

strike conviction, pointing out that prior serious felony convictions frequently are senseless and violent crimes.

Pursuant to section 1385, subdivision (a), the trial court may strike a prior felony conviction "in furtherance of justice." (*People v. Williams* (1998) 17 Cal.4th 148, 161.) The trial court and the reviewing court "must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part . . . ." (*Ibid.*) At the very least, the reason for dismissing a strike conviction must be that which would motivate a reasonable judge. (*Id.* at p. 159.)

We review rulings regarding motions to strike prior felony convictions pursuant to a deferential abuse of discretion standard. (*People v. Williams, supra*, 17 Cal.4th 148, 162; *People v. Myers* (1999) 69 Cal.App.4th 305, 309.) Appellant bears the burden of establishing that the trial court's decision is unreasonable. (*People v. Carmony* (2004) 33 Cal.4th 367, 376 [burden on appellant to establish that sentencing decision is irrational or arbitrary]; *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978 [presumption that trial court acts to achieve lawful sentencing objectives]; *Myers*, at pp. 309-310.) We do not substitute our decision for that of the trial court. "It is not enough to show that reasonable people might disagree about whether to strike one or more of [defendant's] prior convictions." (*Myers*, at p. 310.)

The trial court did not abuse its discretion. Fleming committed the present offenses while on parole and within several months of his release from imprisonment. As noted by the court, Fleming also committed several misdemeanor offenses, including spousal battery and resisting a police officer, after his release from prison. Thus, Fleming has shown a pattern of criminal behavior. (*People v. Gaston* (1999) 74 Cal.App.4th 310, 320 ["unrelenting record of recidivism" compels conclusion that defendant falls within spirit of three strikes law].) The court also weighed the factors in Fleming's favor--the insufficient funds checks were not for large sums of money and he bought necessities for his family--against Fleming criminal history. In view of the nature of Fleming's crimes

and his background, character, and prospects, he does not fall outside the spirit of the three strikes law. (*People v. Williams, supra*, 17 Cal.4th 148, 161.)

The judgment is affirmed.

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GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Barry T. LaBarbera, Judge  
Superior Court County of San Luis Obispo

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Richard Lennon, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Lawrence M. Daniels, Supervising Deputy Attorney General, Rene Judkiewicz, Deputy Attorney General, for Plaintiff and Respondent.